

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *United States Court of Appeals*
For the
District of Columbia Circuit

FILED OCT 20 1958

No. 14,547

Joseph W. Stewart
CLERK

PHILIP G. SEITNER,

Appellant,

v.

107

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HYMAN SMOLLAR

517 Wyatt Building
Washington 5, D. C.

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(i)

QUESTION PRESENTED

The question is whether the evidence in this case when tested by the rule laid down by this court in Guarro v. United States is sufficient to support a conviction obtained under the general assault statute.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,547

PHILIP G. SEITNER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

**APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

Petition for the allowance of an appeal pursuant to Title 11 - 773, D. C. Code, 1951 Ed. from the judgment of The Municipal Court of Appeals (D.C. Mun. App. 1958, 143 A. 2d 101) was granted by this court on August 8, 1958.

STATEMENT OF THE CASE

An experienced Sex Squad officer was in the lavatory of a George Washington University building observing a man within a closed booth by watching through the opening of the door jamb (J.A. 5, 6). After about 5 minutes of this activity, the defendant entered and used the urinal and wash basin (JA 7, 16, 17). That during this period, the officer was aware of defendant's presence and the fact that he was moving about and was also suspicious of the defendant in the "sexual sphere" (JA 7). That during the two or three minutes the defendant was in the lavatory, the officer had done nothing more than stand or walk about and finally when defendant had put on his coat, the officer looked at him and smiled (JA 19). It was after this exchange that the officer went to the urinal and claimed that it was the first time he felt the urge to urinate (JA 9). The defendant testified that the officer did not urinate at the urinal (JA 19). The trial court contended this fact was immaterial (JA 10). The officer testified that the defendant went to the urinal immediately to the left of him and that he engaged him in conversation and after he, the officer, had ceased urinating, the defendant grasped his "privates" (JA 11). The officer testified that he was standing 5 or 6 inches back of the urinal and that his hand was on his "privates" while he was urinating, but he could not recall which one; that the defendant used his right hand to grasp the officer's "privates" and that when defendant's right hand did grasp his "privates", there was no obstruction in the way of defendant doing so (JA 11, 12). The defendant testified that the officer made no objection to this action and did nothing to indicate that this was not what he wanted him to do and turned to ask if he "wanted to take it" (JA 18). The arresting officer was not produced in rebuttal to this testimony. The defendant also testified that when he did not respond and turned to leave, the arresting officer said, "well it is not necessary" and showed him his police badge (JA 18). Later at the precinct station, when being interrogated and asked why he did it, the defendant said he thought the arresting officer had invited what had happened; that the arresting officer

laughed and said, "well that is what I am paid to do, you know" (JA 20). The testimony of a brother officer corroborated the statement of defendant in response to the question of the arresting officer (JA 14).

Defendant was charged under District of Columbia Code, 1951 Ed. Section 22-504 and was found guilty and fined \$150.00 or 90 days (JA 1, 26).

STATUTE INVOLVED

District of Columbia Code, 1951 Edition, § 22-504 provides:

Assault or threatened assault in a menacing manner. --
Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months or both.

STATEMENT OF POINTS

1. The Trial Court erred when he ruled that the arresting officer could engage in provocative conduct as long as he was there pursuant to a complaint, even if unrelated to the Appellant.

2. The evidence of the arresting officer's conduct is more consistent with an act induced in part by apparent consent than with an assault.

SUMMARY OF ARGUMENT

The measure of provocative or inviting conduct in a flirtation between males is the same notwithstanding one of the principals is a Vice Squad officer. A Vice Squad officer visibly exposing himself before a urinal for the purpose of arousing the Appellant cannot take refuge in the fact that he was there on a routine check pursuant to a complaint.

The Trial Court, in appraising testimony of provocative exposure as excusable given the circumstance of a complaint, clearly indicated that the total conduct of the police officer, no matter how provocative, was irrelevant on the issue of assault. In so viewing the case, the question whether the Appellant believed, on grounds considered adequate, that he was dealing with an apparently consenting person, was necessarily ignored as the critical issue. Accordingly, the assumption by the Municipal Court of Appeals that the decision of the Trial Court reflected the applicable rule of law was erroneous.

ARGUMENT

I. THE INVESTIGATION OF A COMPLAINT, NOT RELATED TO APPELLANT SPECIFICALLY, DOES NOT PERMIT CONDUCT BY A POLICE OFFICER AMOUNTING TO APPARENT CONSENT

The fact that the arresting officer was in the men's room pursuant to a routine check related to a year-old complaint does not permit him to indulge in inviting or provocative conduct. If the defendant, in an assault prosecution believes, on grounds regarded as adequate, that he is dealing with a consenting person, he will be treated as if this were so by the operation of a rule in no way specially devised for this situation but extending all through the field of criminal law and applicable generally in case of mistake of fact. Guarro v. United States, 99 U.S. App. D.C. 97, 100, 237 F. 2d 578, 580. Guarro does not pretend to say that a policeman is held to a different degree of conduct if he is present pursuant to a complaint. This was the view of the Trial Court and therefore precluded the Trial Court from properly weighing the evidence so as to satisfy the rule laid down in Guarro. The position of the Trial Court is indicated in the record at the point where counsel for the Appellant was attempting to develop the purpose of the policeman in approaching the urinal -- whether it was to relieve himself or to

entice or invite the Appellant who had already been classified by the police officer as a sexual deviate of some sort. The following colloquy is clearly illustrative of the Trial Court's view:

Mr. Smollar: Well, your Honor, if I may interrogate him on the question of whether he actually did urinate or whether --

The Court: Suppose he didn't, what difference does it make? He was there for a purpose.

Mr. Smollar: Is your Honor satisfied?

The Court: Whether he had the urge to urinate or not makes no difference. I can certainly understand why he went there in the first instance. He went there on a complaint. (JA 10)

The Municipal Court of Appeals in distinguishing the case at bar from Guarro had to assume the application of the rule laid down in Guarro by the Trial Court. Since the record clearly establishes the failure of the trial judge in this respect, the conviction should have been reversed.

II. THE UNCONTRADICTED EVIDENCE AS A WHOLE IS MORE CONSISTENT WITH AN ACT INDUCED IN PART BY APPARENT CONSENT THAN WITH AN ASSAULT

We are dealing here with an admission by the Appellant to the touching. The sole question to be decided by the Trial Court was whether the Appellant, on grounds considered adequate, believed that he was dealing with a consenting person. Of particular significance is the fact that the Appellant admitted to the "sexual touching" because he thought the arresting officer was inviting or showing himself. On this score the testimony of both police officers and the Appellant are not in conflict. It is a well-known fact that in Sex Squad arrests in the District of Columbia, the most damaging admissions by way of guilt and corroboration are obtained by these experienced and skilled officers when interrogating the suspect at the precinct station after arrest. Cf. King v. United States,

D. C. Mun. App. 1952, 90 A. 2d 229, (defendant did not deny his guilt and stated he was willing to "pay any fine"); Bicksler v. United States, D. C. Mun. App. 1952, 90 A. 2d 233, (defendant admitted in soliciting case to using certain terms which have special significance among sexual deviates); Dyson v. United States, D.C. Mun. App. 1953, 97 A. 2d 135, (defendant when asked to explain his actions said, "he did not know, maybe a court will teach him a lesson").

Indeed, in Guarro v. United States, D. C. Mun. App. 1955, 116 A. 2d 408, there was an admission to the doing of the touching because he (defendant) was curious. If it is proper to distinguish this case from Guarro, then it can easily be said that the case at bar is far stronger than Guarro on the subject of the defendant's belief. Since it is apparently undisputed that the defendant believed he was dealing with a consenting person, we can now examine the policeman's total conduct to determine whether the grounds for so believing were adequate.

It is implicit in the nature of the offense charged, particularly when the arresting officer is the complaining witness, that the commission of the crime must, to some extent, reflect police activity. It must be remembered at the outset that it is the policeman's duty to prevent and not encourage crime. McDermett v. United States, D.C. Mun. App. 1953, 98 A. 2d 287. Indeed, Guarro when citing McDermett v. United States, supra, with approval, indicated that a police officer is held to a stricter accountability than the ordinary citizen. Having this in mind, the following important uncontradicted evidence clearly suggests availability:

1. The police officer wandering about the men's room for 2 or 3 minutes for no apparent reason while the defendant was present.
2. The statement of the arresting officer that he suspected the defendant in the "sexual sphere" before the officer went to the urinal.
3. The police officer going to the urinal at precisely the time defendant was readying himself to leave the room.

4. The police officer's testimony that he had been there for 5 minutes before the entrance of the defendant and had not gone to the urinal in that period.

5. The policeman's testimony that he had gone to the men's room for a routine check in the first instance and not for any personal reason.

6. The testimony of the police officer that defendant appeared to be shy and withdrawn.

7. The carrying on of a conversation with the defendant at the urinal before the alleged touching, having in mind the policeman's suspicions with respect to the defendant.

8. The grasping of the officer's "privates" without interference as clearly indicating a permissive and suggestive position at the urinal on the part of the officer.

To sustain this conviction this Court would have to find, at least, that the foregoing evidence is more consistent with guilt than with innocence. Williams v. United States, 1944, 78 U.S. App. D.C. 322, 323, 140 F. 2d 351, 352. As was suggested in Guarro, the conduct of the Appellant might be an offense under other statutes in the District of Columbia¹ but a homosexual touching of an apparently willing and competent person is not an assault. Moreover, we have the uncontradicted testimony of the Appellant of the subsequent invitation by the policeman. This testimony was not rebutted by the testimony of the arresting officer. Since this invitation followed the touching and was not inherently improbable, neither a jury nor a judge is at liberty to disregard such evidence. Stone v. Stone, 78 U.S. App. D.C. 50, 53, 36 F. 2d 761, 764.

¹ Note 2, Guarro v. United States, supra.

In affirming the Trial Court, the Municipal Court of Appeals suggested that the case at bar could be distinguished from Guarro in that the policeman did no more here than permit the alleged touching. It is submitted that the record clearly pictures a flirtation between man and man followed by an intimacy not repelled or discouraged though there was ample opportunity to do so. To hold otherwise would require a separate definition of seduction to fit the activities of a Vice Squad officer in this type of situation.

CONCLUSION

It is respectfully submitted that the judgment of the Municipal Court of Appeals should be reversed with directions to enter a judgment reversing the judgment of conviction and remanding this case to the Municipal Court for the dismissal of the information.

HYMAN SMOLLAR

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Attorney for Appellant

(i)

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JOINT APPENDIX

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IN THE MUNICIPAL COURT FOR THE DISTRICT OF
COLUMBIA
Criminal Division

November Term, A. D. 1957

DISTRICT OF COLUMBIA) ss:

Oliver Gasch, Attorney of the United States in and for the District of Columbia, who, for the said United States prosecutes in this behalf, by J. Philip Smith, one of his assistants, comes here into Court at the District aforesaid, on the 15th day of November, in the year of our Lord, one thousand nine hundred and 57, in this said Term, and for the said United States, gives the Court here to understand and be informed, on the oath of one Louis A. Fochett that one Phillip G. Seitner late of the District aforesaid, on the 14th day of November in the year of our Lord, one thousand nine hundred and 57, in the District of Columbia did unlawfully assault Louis A. Fochett against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said Phillip G. Seitner in this behalf to make him answer to the said United States touching and concerning the premises aforesaid.

Oliver Gasch
Attorney of the United States
in and for the District of Columbia.

By /s/ J. Philip Smith
His said Assistant.

Personally appeared Louis A. Fochett before me this 15th day of November, A. D. 1957, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

/s/ J. Philip Smith
Assistant Attorney of the United States
in and for the District of Columbia.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

IN THE
MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES

v.

PHILLIP G. SEITNER,

Defendant.

:
:
:
:
:
:

Criminal Action No. US-7656-57.

[Charge: Assault]

Washington D. C.,

Friday, December 6, 1957.

The above-entitled matter came on for trial before Judge Thomas C. Scalley in Courtroom No. 319, Criminal Division Building, at approximately 10:55 o'clock a.m.

APPEARANCES:

On behalf of the Government:

Edward C. O'Connell, Esq.
Assistant-United States Attorney.

On behalf of the Defendant:

Hyman Smollar, Esq.,

*

*

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LOUIS FOCHETT

was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'CONNELL:

Q. Would you state to the Court the circumstances surrounding your observation of this defendant? A. I was in the men's room which is in the basement of that building and, while there, the defendant came in and he remained standing in the room. I noticed at one time he

4

was in front of the urinal for a couple minutes. Then I walked over to one of the urinals and he walked over and stood next -- directly next to me, on my left and made the comment that it was still raining.

I said, "Yes. That's Washington weather for you."

And at that time he reached over and placed his hands on my privates and I placed him under arrest. And I walked him out of the room and Officer Arscott and Officer Rinaldi were standing just outside the door, and I turned Mr. Seitner over to Officer Arscott and asked Arscott to hold him for me.

Q. I see, Officer, Now, subsequent to this arrest did you have occasion to have a conversation with the defendant? A. Yes.

Q. Would you relate that conversation? A. A little later on in the Morals Division, I talked with the defendant and I asked him if he remembered placing his hands on my privates, and he said -- I asked him why he did it. He said, "Well, I guess I lost control of myself."

So, I asked him why he was in that school building, if he attended that school. And he said that he didn't.

I said, "Well, why were you there?"

5 And he said he was going to the library but he wanted to go down -- he wanted to comb his hair so that's why he was in the men's room.

And I asked him again if he had any -- if he knew of any reason why he touched my privates.

And he said, "Well, I thought you were exhibiting."

So, I then asked him if he had ever before touched any man's privates --

* * * *

THE WITNESS: So, I asked him if he had ever touched any privates before -- any man's privates before, and he said that he had, but it had been some time previous, when he was in college.

So, then I asked him some other questions. I asked him if he had ever engaged in any homosexual activity and he didn't say anything like, "I don't want to answer" but he became nervous and he commented that "What am I supposed to do? Stay locked up in the apartment all the time? That's all I ever do."

I said, "Well, maybe that's your trouble." I said, "Maybe you ought to get out a little more."

I didn't go into it any further because he acted like he was pretty much upset, so I didn't question him any more.

* * * * *

Q. Now, Officer, you stated that at the time you walked up to the urinal that the defendant was in the room. A. Right.

Q. At that time -- A. That's right.

Q. -- where in relation to this urinal was the defendant, if you recall? A. Yes. He was pretty close to some wash basins, which are about ten or twelve feet across the room from these urinal stands.

Q. And when you walked up to the urinal, what, if anything, did the defendant do at that time? A. Well, he walked directly over to some windows which are on the left wall, that is, at a ninety-degree angle from the urinals and peered out there just for a moment or just glanced out and then he walked right over and stood directly next to me, on my left.

Q. On your left. A. Right.

Q. I see, Officer. About what period of time elapsed between the time that he arrived at the urinal next to you and the time that this alleged assault took place? A. Oh, about a half a minute.

7 * * * * *

CROSS-EXAMINATION

BY MR. SMOLLAR:

Q. Mr. Fochett, how long were you in that urinal before Mr. Seitner, the defendant, appeared there; that is, how long were you in the men's room? A. Well, I had been in there -- (pause) -- probably four or five minutes. I don't recall for sure.

Q. That is, before Mr. Seitner had arrived in the men's room? Is that right? A. That's right. That's right.

Q. And in those four or five minutes did anybody come in besides Mr. Seitner? A. Yes.

Q. How many people came in in those four or five minutes? A. The best I recall, there was one or two.

Q. And they came in and went out; is that correct? A. Right.

Q. Now, at the time Mr. Seitner came in there, was there anybody else in the men's room? A. Yes; there was.

8 Q. And where was that other person? A. He was in a closed booth, the one on the right side of three which are in that room.

Q. That is, there are three booths. A. Right.

Q. And he was in one of them. A. That's right.

* * * * *

9 Q. When you got in there, were you aware of or had you seen the man that was in one of the booths? A. Just immediately after I walked in, I saw him.

Q. I see. When you saw him, was he in the booth? A. Yes.

10 Q. He was in the booth. A. Right.

Q. Was the booth door open? A. It was not.

Q. It was not. Now, how did you see him there? A. Through an opening in the door jamb.

Q. Through an opening in the door jamb. A. Right.

Q. Is that right? A. Yes.

Q. And when you saw him, you decided, I believe, to keep him under surveillance; is that right? A. That's right.

Q. And that's not the defendant here. A. It is not.

* * * * *

Q. How were you dressed, by the way? A. (Pause) -- I had a raincoat on.

* * * * *

11 Q. Suit and raincoat. A. Right.

Q. And when you first came in to that men's room, there was nobody there except this closed booth; is that correct? Except whoever might be in that closed booth. A. That's right.

Q. All right. And then you looked, that is, through the door jamb and, on the basis of what you saw at that time, you decided to keep that man under surveillance; is that right? A. That's right.

Q. That wasn't Mr. Seitner. A. That's right.

Q. That was someone else entirely; is that correct? A. Correct.

Q. All right. Now, you stayed there then, I believe, for four or five minutes. A. I did.

Q. All right. Did you continue to keep that man under surveillance in that four or five minutes? A. I'd say about seventy-five per cent of that four or five minutes.

Q. And the rest of the time what were you doing? A. Well, I didn't keep a direct staring -- keep directly staring into that booth. I looked off once or twice; I'm sure of that.

12 * * * * *

Q. So, you were in there for a total of four or five minutes. Now, initially when you went into the men's room, what did you go in there for? A. A routine check.

Q. Just a routine check. A. That's right.

BY THE COURT:

Q. Had you had complaints? A. Oh, yes.

Q. This is George Washington University. A. That's right.

Q. And you had had complaints. A. Yes. That's right.

THE COURT: Thank you.

BY MR. SMOLLAR:

Q. All right. Then you went in for a routine check; is that correct?

13 A. Right.

Q. At that time you didn't have the urge to urinate yourself; did you? A. No.

Q. All right. So that when you were in there for the four or five minutes, other than the seventy-five per cent of the time you kept that man in the booth under surveillance, the other twenty-five per cent was spent in just walking around. A. I stood pretty much still.

Q. You stood pretty much still. A. Yes.

Q. All right. Now, where were you precisely, if you can recall, when Mr. Seitner came in? A. Yes. I was directly across from the doorway to that first closed booth there or stall.

Q. Right here? A. Approximately there.

Q. That is the wall closest to the doorway directly opposite that; is that correct? A. That's right.

Q. When Mr. Seitner came in -- when the defendant came in, were you leaning against the wall or standing straight up at that time?

A. Best I recall, I was standing straight up.

14 Q. And he came in and where did he go immediately when he came in? A. He walked over in the direction of the urinals and wash stands.

Q. And where did you go? A. I just remained standing where I was.

Q. You remained standing right here; is that correct? A. That's right.

Q. Now, how long after Mr. Seitner came into that men's room did you move from this position? A. Well, it was a short time. I'd say -- (pause) -- two or three minutes, the best I could estimate.

Q. That would be between two or three minutes; is that correct? A. That's right.

Q. When you moved from this position. A. That's right.

Q. Up to that time you had stayed in that position. A. That's right.

Q. And had you observed the defendant Seitner during that time? A. I was aware that he was there and moving about.

Q. All right. Now, when you say you were aware, can you tell us what you actually saw him do in those two or three minutes? A. Move
15 about in that area, go to the urinal, and at one time he was at the mirror.

Q. All right. You say you saw him go to the urinal in those two or three minutes; is that correct? A. That's right.

Q. And you saw him go to the mirror in those two or three minutes. A. That's right.

Q. Did he ever go to the wash bowl in those two or three minutes? A. I don't recall for sure, but I wasn't watching him the whole time. I know he was moving around.

Q. All right. During the time he was moving around, did you in any way indicate -- oh, by the way, did anybody come in during the time he was moving around? A. No, sir.

Q. All right. Did you in any way indicate to him your presence there? Either by looking at him or by any conversation with him.

THE COURT: What do you mean? With a glance from him? Excuse me. Go ahead. I don't know whether he can answer the question or not. Reframe your question.

MR. SMOLLAR: All right.

BY MR. SMOLLAR:

Q. You say you were aware of what he was doing in that anteroom.
16 Now, being aware of what he was doing in that anteroom would mean that you were looking in that direction; is that correct? A. I looked over there a couple of times.

Q. All right. When you looked over, you said he was moving about. Isn't that what you said? A. That's right.

Q. All right. When you say he was moving about, were you aware of the fact of whether he was looking at you, too, during that time?
A. (Pause) -- I can't remember whether he looked at me or not.

Q. Now, there came a time when you moved from this position; didn't there? A. That's right.

Q. That was after approximately two or three minutes stay there; is that right? A. That's right.

Q. And where did you move to from this position? A. Toward the urinal stands.

Q. The urinal stand; is that right? A. That's right.

Q. And which one did you go to? A. Just about the center one, as close as you can get to the center.

17 Q. That would be about here (indicating on the diagram), about the third from the stalls or the third from the windows which are shown here. A. Yes. That's right.

Q. Is that right? A. Right.

Q. Now, in moving from here to the urinal, during the time you were moving in this direction, where was the defendant? A. Close to the wash basin.

Q. That is over here? A. Right.

Q. Was he washing? A. I can't remember. The best I can recall, he wasn't.

Q. Well, when you say he was close, do you mean he was moving or standing still? A. Standing still.

Q. And he was facing in which direction? The wash basin? Or was he facing you?

* * * * *

18 Q. Well, were you aware of the fact that he was looking in that direction at that time? A. (Pause) -- well, I just testified that he was looking over that way, so I was aware of it.

Q. Were you suspicious of him at that time? A. I'd say a little bit suspicious.

Q. You were a little bit suspicious. A. That's right.

Q. And when you say you were a little bit suspicious, you felt that he was some kind of a deviate or homosexual. A. Well, I hadn't made up my -- any decision along that line.

Q. But your decision was in the sexual sphere. A. That's right.

* * * * *

19 Q. It was at that time you went there -- did you then urinate?
A. Yes.

Q. Now, that was the first time you felt the urge to urinate since you had come into the men's room; is that correct? A. I don't remember.

* * * * *

Q. When you got to the bowl or to the urinal, you were still wearing your coat; is that correct? A. Right.

* * * * *

20 Q. Now, during that time, that is, when you went over to the urinal, then this booth was still closed; is that correct? A. That's right.

Q. But as far as you were concerned, this man was still under surveillance; isn't that right? A. Yes.

Q. But you left that position in order to urinate without knowing whether he did go out at that time; is that correct? A. That's right.

Q. So, then your urge to urinate was fairly severe at that time;

isn't that correct?

THE COURT: I don't see where that has anything to do with the assault. He testified that he went there for a purpose, or a complaint. No question of that. O.K. Answer that.

MR. SMOLLAR: Well, your Honor, if I may interrogate him on the question of whether he actually did urinate or whether--

THE COURT: Suppose he didn't, what difference does it make? He was there for a purpose.

MR. SMOLLAR: Is your Honor satisfied?

THE COURT: Whether he had the urge to urinate or not makes no difference. I can certainly understand why he went there in the first instance. He went there on a complaint.

21 All right. Don't let me interrupt you. Go ahead and answer if you can recall all these minute details.

* * * * *

Q. Mr. Fochett, you say you went there on a complaint. Was that a complaint with reference to this particular defendant? A. No, sir.

Q. That is, you had looked in the George Washington University men's room quite frequently; is that correct? A. Within the last year or a little longer.

* * * * *

24 BY MR. SMOLLAR:

Q. Now, Mr. Fochett, I note that in this statement that you asked him again "if he remembered touching my privates and why he did it; he stated that I was exhibiting it." That is referring to you; is that correct? A. That's right.

* * * * *

27 Q. Well, when you said that he appeared to be shy, did he also
28 appear to be shy earlier that evening? A. Yes.

Q. That is, he appeared to be quite withdrawn in his actions; is that correct? And that would be in the men's room, too, is that right? A. I wouldn't say he was withdrawn in his action; just that he had that look in his face to me.

* * * * *

Q. After he touched your privates, what did you do? A. I showed him my badge and told him he was under arrest.

Q. Now, that was immediately after the touching; is that correct?
A. That's right.

Q. Well, were you still at the urinal when you did that? A. Right.

* * * * *

29 Q. And then when you showed him your badge, where was he at that time? A. He was right next to me, on my left.

* * * * *

30 Q. Tell us, when you were standing at the urinal there, Mr. Fochett, how far back from the urinal were you standing? A. From the outer edge, I'd say about five or six inches.

Q. Had you taken off your coat? A. No.

Q. Where were your, both of your hands at the time you were urinating? A. One was on my privates, the other -- (pause) --

Q. Which one was it?

THE COURT: If you can recall.

THE WITNESS: (Pause) -- I don't recall whether I had it in my pocket or just at my side.

BY MR. SMOLLAR:

31 Q. Well, he was to the left of you; wasn't he? A. He was.

Q. And what hand did he use to grab your private? A. Right hand.

Q. And when he reached over, if your left hand was on your privates, he would have to supplant your left hand; wouldn't he?

THE COURT: What do you mean? I don't understand.

BY MR. SMOLLAR:

Q. Well, could he get by your left hand? A. Well, then my left hand probably wasn't on my privates because there was no obstruction there or bumping of arms or hands or anything else.

Q. There was absolutely no touching when his right hand went over; is that correct? There was no touching of any part of your arm or coat or clothing. A. Well, there may have been a brushing of clothing.

Q. At that time you had been standing there, if I recall, about

thirty seconds; is that correct? A. Yes; I think that's what I testified.

Q. Now, after you made the arrest, did you take him out of the men's room? A. Yes; I did.

* * * * *

34 Q. Now, Mr. Fochett, were you solicited for a lewd and indecent purpose after this event?

MR. O'CONNELL: Objection.

THE COURT: Sustained.

* * * * *

42 BY MR. SMOLLAR:

Q. I believe, Mr. Fochett, that you said during my cross-examination of you earlier that during the time that you were opposite that door or at some time that you were opposite that door and while Mr. Seitner, the defendant, was in the men's room, you began to suspect that he might be a homosexual; is that correct? A. No. I don't think I testified to that. I testified that I became a little suspicious of him, and you said, "In a sexual sphere?" And I said, "Yes."

Q. I see. Well, how long would you say it was after he was in there that you became suspicious of him? A. (Pause) -- The time was all pretty short, a minute or two. It wasn't too much time through the whole thing there. I just got a notion that he kept moving and walking about there -- (pause) -- I thought perhaps that he was up to something.

* * * * *

43 CHARLES E. RINALDI

was called as a witness for and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'CONNELL:

* * * * *

Q. Would you state for the Court in your own words just what occurred? A. Around 8:45 Officer Fochett went into the men's room in
44 the basement of Building C of George Washington University.
About four or five minutes later he came out with the defendant under

arrest. The defendant stayed out there with Officer Arscott, and Officer Fochett and I had occasion to take care of another matter immediately following. The defendant was later sent to -- was taken to a call box and sent to the central cellblock by wagon.

* * * * *

Q. At any time subsequent to that time did you have occasion to observe the defendant? A. Yes, sir; I did.

Q. Would you state the circumstances under which you observed the defendant, Officer?

* * * * *

THE WITNESS: Later in the Morals Division Officer Fochett in-
45 terrogated the defendant. The defendant said that he was at the University as he wanted to use the library; said he went downstairs as he wanted to comb his hair. The defendant stated that he started talking to Sergeant Fochett. Fochett asked him if it was true that he placed his hand on his privates. The defendant said, well, he lost control of himself. The defendant stated that the reason he did that was because Sergeant Fochett showed himself. He said that he had touched men's privates in the past. The last time was in college. He would make no further statement about any past activities as he claimed he would be embarrassed.

* * * * *

Q. I see. Now, Officer, at the time you state this conversation took place between Officer Fochett and the defendant here, where were you in relation to that conversation? A. I was at the next desk.

Q. And were you in a position where you could hear the conversation, Officer? A. Yes.

* * * * *

CROSS-EXAMINATION

BY MR. SMOLLAR:

46 Q. What were you doing at the next desk, Officer Rinaldi? A. I had been processing a prisoner that I had arrested.

Q. Were you processing that prisoner all the time that Officer

Fochett was interrogating Mr. Seitner? A. Not all the time, sir.

Q. Well, how much of the time? A. (Pause) -- Part of the time I made a point to hear what I was supposed to.

Q. Was your attention called to particular parts that you were supposed to hear? A. No; it wasn't called.

Q. All right. Then during the time you were processing somebody next to Mr. Fochett, you say you heard all of this conversation that you have testified to; is that correct? A. Yes, sir. That's correct.

Q. Did you hear, in addition to that, the questions asked with respect to his parents, his friends? A. The defendant made a statement about -- (pause) -- not knowing too many friends as he stays home quite a bit.

* * * * *

47 THE WITNESS: Right now I have an independent recollection that when asked about further activities, he said he didn't want to talk as he would get embarrassed; that he started a conversation, and that he told Sergeant Fochett that he showed himself and that he lost control of himself.

Q. Well, actually what he told Sergeant Fochett at the time, wasn't it; that the reason he touched it because Sergeant Fochett was exhibiting himself? Weren't those the words? A. Exhibiting or showing. I can't remember. It was either one.

* * * * *

63 PHILLIP SEITNER,
the defendant, having been called as a witness in his own behalf and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMOLLAR:

Q. Would you state your name, please? A. Phillip Seitner.

* * * * *

66 Q. On the evening of that day, where did you go? Just tell us where you went. A. Well, after I left the office, I had had some things held for me downtown. So, I went down and picked them up. It was

raining. So, I went home and I did just ordinary domestic things, I guess.

Q. Do you live at home alone? A. I do. Yes.

Q. I see. A. And when finally the rain stopped, I went out and went -- was going to the library and get dinner because I get dinner about that time.

Q. What library were you going to? A. I went to George Washington University Library.

Q. In connection with your work, did you use George Washington Library in the past or had you been there before? A. Yes.

* * * * *

68 Q. Go ahead. A. -- and I went into the library because it had started to sprinkle again. I was going to the stacks there. Then I learned that if either of the two places closed, it was going to be the cafeteria first. So, I decided to go get dinner first and then go back to the library. I went -- or, I was headed to the cafeteria and I went through the passageway downstairs and then as I went down, there were two gentlemen standing in the hallway. I went upstairs and it was raining so hard that I decided, well, just wait for a minute or two; it had been doing this all day. In the meantime, I went back downstairs where I would use the gentlemen's washroom. The two men were still there.

Q. Those are two men outside of the men's room; is that correct?
A. Yes. I assumed they were students. I went in and although I wouldn't have been able to say where the --

Q. No. Just when you went in there, what did you do? A. When I went in, I took -- I tossed my coat over one of the open doors --

* * * * *

69 Q. As you recall it. Now, you say that when you went in, you threw your coat and umbrella on one of the doors; is that correct?

A. That's right.

Q. And you are referring now to a door to the booth; is that right?

A. That's right.

Q. Which door was it? A. Well, it must have been the second; the second or the third.

Q. When you say the second or the third, do you mean the second or the furthest from you and away from the doorway? A. That's right, sir.

Q. All right. Now, did you notice at that time whether any of the booths were occupied? A. No; I did not.

Q. Now, at that time did you notice whether anybody was in the men's room? A. At the point that I hung my coat?

70 Q. Yes. A. I recognized that there was another person in the room; yes.

Q. And where was he, if you can remember? A. Well, it wouldn't be honest to say that I remember exactly. I thought that he was at the other end, but he said this morning he was at this end, and I suspect that that is right, that he was there, but I didn't pay any attention to him truly. So, I can't tell you where he was.

Q. Now, did he appear to be engaged in any activity in the men's room as far as you could see? A. No. He was doing nothing but standing there. I thought he was on his way out but he just stayed there.

Q. And what did you do? A. Well, after hanging up the coat and umbrella, I went to the urinal. I must have been there for a couple of minutes.

Q. Did you at that time urinate? A. Of course.

Q. All right. Then what did you do after that? A. And then I turned around to the wash basins and, when I did, I noticed that the man was still there.

Q. Where was he then? When you say "the man", do you mean Mr. Fochett? A. The man who was Mr. Fochett; yes.

Q. I see. Then what did you do? Or, where was he then, rather?

71 A. He was at a position in front of those booths; yes, that would be to my left.

Q. That is somewhere here (indicating on diagram), in this area; is that correct? A. That's right.

Q. That is in front of the booths. And how close to the wall was he? That is the wall that the basins were hung on, the wash basins.

A. Well, he was probably three or four feet from the mirror that he has drawn there.

Q. I see. Now, at that time was he standing still or walking?

* * * * *

THE WITNESS: Thank you. He was standing, as I say, to my left and after I had washed and dried my hands, I went to comb my hair, and I remember wishing that he wouldn't watch me because I don't like having people watch me combing my hair, so -- but he did. And then he moved past me to my right to stand in front of the wash basin. And then I took down my coat and umbrella, put on my coat, and I've been catching
72 ing a cold all day; so, I stopped and blew my nose. At that point, that is the first time actually that I had looked at the man although I had been conscious of his being there. But I did look at him and he looked at me, and just as soon as he saw that I was aware of him, he turned and went to the urinal.

Q. And what did you do? A. Well, I understood what he was --

* * * * *

THE WITNESS: I went over to the window which was the only window that was open, was the one directly in line with the urinal.

* * * * *

A. Yes. I glanced out and immediately turned about as if to leave. But when I turned around, I noticed that the man was standing there and exposing himself. And I stopped -- (pause) -- and he just kept standing there and I kept standing there. It was -- (pause) -- and finally when it
73 was obvious to me what he wanted --

MR. O'CONNELL: Objection, your Honor.

THE COURT: Just tell us what you did. Never mind about what was obvious. Just exactly what the actions were, what you saw and heard and what you did.

THE WITNESS: Well, after a period of standing there, I -- (pause)-- I touched the man because -- (pause) -- I don't know why I did it -- (pause)-- and he didn't do anything -- (pause) --

* * * * *

Q. Mr. Seitner, when you say he didn't do anything, what do you mean by that? A. Well, I mean he made no objections to this and --

(laughing) -- nothing to indicate that this wasn't what he wanted me to do, and then he turned toward me and asked me that question and --

Q. What did he ask you? A. (Pause)

Q. What did he ask you, Mr. Seitner? A. (Pause) -- He asked me if I wanted to take it.

Q. What did you do then? Did you respond? A. Well, no. I guess I was shocked or something and I turned to leave.

74 Q. Now, when you turned to leave, what was the next thing that was said to you? A. (Pause) -- Well, he must have been about three feet away from the place and he said, "Well, it's not necessary." He showed me a badge.

Q. Now, Mr. Seitner, when you went over to the window and you saw him, was he standing at the urinal? A. That's right, sir.

Q. And could you tell us how far back from the urinal he was standing? A. Well, I certainly wouldn't measure in inches, but it was far enough back so that I could see he was exposing himself.

Q. What kind of a urinal was it? One that went to the floor?
A. Yes, sir.

Q. How was he dressed? A. As he described himself. He had on a coat and a suit. He was well dressed, as a matter of fact.

Q. Did he have a hat on? A. No. He didn't have a hat on.

Q. When he was standing in front of the urinal, where were both his hands as far as you could determine? A. Well, his hands assisted him in holding his coat back so that I could see like what --

MR. O'CONNELL: Objection. It's a conclusion.

75 THE COURT: He can testify. He said he saw his hands holding his coat back so he could touch him. Is that what you said?

THE WITNESS: That's right, sir.

* * * * *

76 Q. Now, at that time, Mr. Seitner, had you been aware that he had been there for some little time before that? A. Yes. That goes without saying that he was there.

Q. During the time that he was there, Mr. Seitner, had he, up

until the time that he moved over to the urinal, had he done anything in that washroom, other than stand or walk? A. Nothing.

Q. Now, at that time, when you got your coat, Mr. Seitner, did you have occasion then, I believe you testified, to look at him; is that correct? A. Yes. That was the first time I actually looked at him and, if I hadn't then, I probably would never have known what he looked like.

* * * * *

77 Q. Can you describe the expression on Mr. Fochett's face when you saw him at that time? A. Well, it was -- he was just --

MR. O'CONNELL: Your Honor, I am going to object to this question unless he wants to describe the position of the mouth and so on.

THE COURT: What do you mean by expression? Was he laughing, smiling, grinning?

MR. SMOLLAR: Yes, your Honor.

THE COURT: He may testify as to what he saw.

THE WITNESS: Thank you.

THE COURT: Fochett -- was he laughing, smiling, grinning, or what?

THE WITNESS: Well, it was just a pleasant smile at me. That's all. I mean, he certainly wasn't grinning or anything like that.

* * * * *

Q. When you saw Mr. Fochett at the urinal, was he urinating at that time? A. No; he was not.

Q. Was he ever urinating during the times you saw him at the urinal?

78 * * * * *

Q. Was he ever urinating during the time you were standing at that urinal? A. Never.

THE COURT: But he could have urinated and you not see him?

THE WITNESS: It would have been the world's shortest, sir.

THE COURT: Sir?

THE WITNESS: It would have been the world's shortest because--

THE COURT: That's not what I asked you. He could have urinated and you not see him; is that correct?

THE WITNESS: (Pause) -- I can't honestly say that it's possible.

THE COURT: All right.

* * * * *

79 Q. -- when you were over at the window looking at him, you could see his private parts at that time; is that right?

* * * * *

A. Yes; I could.

Q. And did you see them? A. Yes.

Q. All right. Now, during the time from the time you were at the window until the time you went next to him at the urinal, did you see his private parts? A. Yes; I did.

Q. And was he ever urinating during that period of time? A. No; he was not.

* * * * *

81 Q. Now, will you tell the Court just what the questions were, as best as you can remember, and what your answers were? A. There were a number of routine questions: my name, family residence, period I had been in Washington, education, what my occupation was, and when these routine things had been done, he asked me -- he turned to me specifically and asked me why I had done what I had done, and I tried to explain to him that it was something I would never have done if it hadn't been that he --

MR. O'CONNELL: Your Honor, if he will just state what he said. Objection. It's not responsive.

THE COURT: I don't want any actions; just what was said.

THE WITNESS: I told him that I thought he was inviting what had happened, and I still think that. And he just -- he wasn't unpleasant; he just laughed and said, "Well, that's what I'm paid to do, you know." And he told me how long he had been at this game.

* * * * *

82 Q. What else did he ask you and what else did you tell him at that time? A. Well, he asked -- I didn't realize that I had -- he asked if this had ever happened before and I didn't want to say anything and then I did tell him that something similar to it had happened when I was a student.

And he asked me if I didn't think I needed some sort of guidance. He said he would like to see me oriented and adjusted better to myself, and I -- (laughs) -- I couldn't answer that. There wasn't anything to answer, as a matter of fact.

* * * * *

Q. Now, did you ever believe on that evening just prior to the touching that you were dealing with a non-consenting person?

MR. O'CONNELL. Objection.

THE COURT: Sustained.

* * * * *

83 CROSS-EXAMINATION

* * * * *

88 BY MR. O'CONNELL:

Q. I see, sir. And after did you at that time comb your hair?

A. Yes. As a matter of fact, I put some water on it and combed it.

Q. And at this point you had had no conversation with the officer; is that correct? A. Indeed not.

* * * * *

90 Q. And at that time you had already visited the urinal; you had combed your hair, and you had washed your hands; is that correct?

A. That's right.

Q. At that time did you leave? A. No; I did not leave.

* * * * *

93 Q. Let me ask you this: From the time you progressed from the front of the booth to the time you went to the window, Officer Fochett was in fact in front of the urinal. A. Yes; he was.

Q. And at that time his back was to you; wasn't it, sir? A. Yes.

Q. He had a coat on; didn't he, sir? A. Yes.

Q. Were you able at that time to see his privates exposed? A. I wouldn't know what you mean by "that time."

Q. At that time -- from the time you progressed from in front of that booth until you reached the window, were you able to see his privates exposed? A. I couldn't because I didn't even look at that time.

94 Q. And, yet, you were ready to leave; were you not, when you got down your coat? A. I could have left; yes.

Q. You could have left; but you didn't. A. (Pause)

Q. Is that correct, sir? A. I did not.

* * * * *

97 Q. You state that you walked back to that window. Did you look out that window? A. I just glanced out to see if it was still pouring down rain.

Q. Is there an areaway or what fronts on that window, sir?

A. Apparently, just an areaway because all I saw was a concrete wall.

* * * * *

Q. Up to that time, at no time had you seen Private Fochett's privates exposed; is that correct? A. Up to that time; no.

Q. I see, sir. But if this were the window facing in this direction, Officer Fochett would have been to your right rear; is that correct?

A. When I glanced out the window, he would have been to my rear.

98 Q. To your right rear. Did Officer Fochett say anything to you at that time, sir? Did he call you? A. At that moment?

Q. Yes. A. I was at the window scarcely a second and turned around --

Q. And you turned towards the urinals; is that correct? A. That's right.

Q. And at that time did you look at the officer? A. I did.

Q. I see, sir. Now, you heard the testimony that Officer Fochett was approximately at the middle urinal, and you, by your own testimony, put yourself over here by the window; is that correct? A. That's the way it was.

Q. At that time, after you looked and saw Officer Fochett, you went over to where Officer Fochett was standing; is that correct? A. That's right.

Q. This alleged touching took place in front of the urinal where he had been standing; is that correct? A. Yes.

Q. About how far, would you say, that was, sir, that you journeyed

over there? How much of a distance? A. (Pause)

Q. A short distance? A. It was a short distance.

99 Q. I see. Now, from the time you arrived next to Officer Fochett, what period of time elapsed between that and the touching? A. Well, it was -- (pause) -- it must have been three-quarters of a minute or a minute. It seemed a long time.

Q. Was there a conversation that took place? A. Only that I remarked that it was still pouring.

Q. And what was Officer Fochett's comment? A. I tried to remember what these were. He said something about its being typical of Washington weather, and then I replied something about the weather. I don't remember what I said.

Q. At that time did the touching take place? A. No. There was still an interval.

Q. Was there any conversation? A. No. He just looked at me and -- (pause) --

Q. But that was the extent of the conversation before this touching took place? A. Yes.

Q. You said, "It's still raining outside." And Officer Fochett answered, "Yes. That's typical of Washington weather." Is that correct? A. I wouldn't say that was verbatim, but that was --

Q. In substance, that's it. A. That's right.

100 Q. And after that there was no further conversation at all; is that it? A. No further conversation.

Q. And at that time you reached over and took hold of the officer's privates.

MR. SMOLLAR: Do you want to answer that question? Or, did he answer that question?

BY MR. O'CONNELL:

Q. Did you or did you not? A. (Pause)

THE COURT: He may answer.

THE WITNESS: Well, it's obvious that is what he wanted--

THE COURT: No. No. No. The question is: Did you?

MR. SMOLLAR: Did you?

THE WITNESS: Yes. I touched him.

* * * * *

- 102 Q. Mr. Seitner, you stated that at the time Officer Fochett was standing against this urinal, you were here (indicating on diagram) putting on your coat; that you then walked over to here (indicating on diagram);
- 103 that you at no time saw the private parts of Officer Fochett exposed; is that correct? A. That is true.

* * * * *

104 REDIRECT EXAMINATION

BY MR. SMOLLAR:

Q. Mr. Seitner, about how much time elapsed between the time Mr. Fochett went over to the urinal and you went over to the window?

A. Well, I'm afraid to say. It was almost immediately.

Q. All right. How many seconds would you say? Was it more than two? A. When I started, you mean?

Q. Yes. A. Oh, well, no. It might have taken me a couple of seconds to get there; yes.

Q. When you got there to the window, as I gather it, you glanced out the window. A. That's right.

Q. And then you turned around; is that correct? A. That's right.

Q. At that time you were able to see Officer Fochett's private parts; is that correct? A. Yes.

- 105 Q. I beg your pardon. A. Yes.

Q. Was he urinating at that time? A. Indeed not.

Q. All right. Now, from the time you walked from the window until the time that you ultimately touched his private parts, as you admit here on the stand, was he urinating? A. If he had been, I'd have gone out.

THE COURT: No; no. That's not the question.

BY MR. SMOLLAR:

Q. Just answer the question, please. A. I'm sorry. No.

Q. Now, when Mr. Fochett walked over to the urinal, Mr. Seitner, and you had your coat on, I believe you said, did you form an opinion at that time with respect to whether or not Mr. Fochett was inviting you --

MR. O'CONNELL: Objection, your Honor.

THE COURT: Sustained. I think I'm here to determine those opinions, to draw those inferences and deductions. His opinions have nothing to do with it.

MR. SMOLLAR: It has to do with the mens rea, his intent at the time. You are sustaining the objection?

THE COURT: Yes.

MR. SMOLLAR: That's all.

* * * * *

106

DR. FRANK CAPRIO

was called as a witness for and on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMOLLAR:

Q. Doctor, would you state your name, address, and profession?

A. Frank Caprio. My office is located at 1835 Eye Street, here in Washington, and I specialize in psychiatry.

Q. Have you been sworn? I guess you have.

THE DEPUTY CLERK: I have just sworn him.

Q. And are you admitted to practice medicine in the District of Columbia? A. Yes; I am.

Q. And how long have you been in the specialty of psychiatry?

A. Since 1935.

* * * * *

121

THE WITNESS: Yes. I believe that his frame of mind, based on his basic personality makeup, was of such a nature that he would not have made this aggressive gesture, had not the circumstances that you described in the hypothetical question taken place, like the exposure and so forth and so forth. He's not capable of making a homosexual assault -- that's what I tried to testify to -- without a given situation or set of circumstances, because of his passivity.

* * * * *

135

THE COURT: The Court is ready to rule. I'm going to find the

defendant guilty. Do you want me to dispose of it now?

* * * * *

136 THE COURT: I'll fine him \$150 or ninety days.

* * * * *

139

JUDGMENT

December 16, 1957

Judge Scalley

Plea Not Guilty.

Judgment Guilty.

\$150.00 or 90 days.

Appeal Bond \$500.00.

140

[Filed Dec. 16, 1957]

THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA)

v.)

PHILIP G. SEITNER)

No. U. S. 7656-57

NOTICE OF APPEAL

1. Name and address of appellant.

Philip G. Seitner
1315 New Hampshire Ave., N. W.
Washington, D. C.

2. Name and address of appellant's attorney.

Hyman Smollar
517 Wyatt Building
777 - 14th Street, N. W.
Washington, D. C.

3. Offense.

Assault - Title 22, Section 504 District of Columbia Code,
1951 Ed.

4. Date of Judgment or Order.

December 6, 1957

5. Brief description of judgment or order.

\$150.00 fine or 90 days.

6. Where confined, if not on bail.

Defendant is not confined.

The above-named appellant hereby appeals to the Municipal
Court of Appeals for the District of Columbia from the judgment or order
above-mentioned.

/s/ Hyman Smollar
Attorney for Appellant

PETITION FOR REHEARING

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,547

PHILIP G. SEITNER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HYMAN SMOLLAR

517 Wyatt Building
Washington 5, D. C.

Attorney for Appellant

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,547

PHILIP G. SEITNER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING

Appellant respectfully petitions the Court, in accordance with Rule 18 of the Rules of the Court governing review of cases from the Municipal Court of Appeals for the District of Columbia, for a rehearing of the per curiam decision entered in the above cause on December 11, 1958, on the ground that the Court by its decision now permits the use of a police decoy in a prosecution under the assault statute¹ for a homosexual touching of an apparently willing and competent person. The decision of this Court is in direct conflict with the proscription

¹ D. C. Code, 1951, Sec. 22-504

found in the decision of Guarro v. U. S., 99 U. S. App. D. C. 97, 101, 237 F.2d 578, 582:

"There are many situations wherein use of police decoys is permissible, and perhaps a practical necessity. Drug peddlers are hard to catch if the undercover policeman may not make a purchase. And of course, he may make a purchase, and it may lead to a conviction. The difference however between that case and this is that selling drugs is a crime against society no matter how willing the customer may be to purchase, whereas, a homosexual touching of an apparently willing and competent person is not an "assault" whatever else it may be in the catalogue of criminal offenses."

The distilled meaning of the language quoted is that when the victim of a homosexual touching is a police decoy, the clear and irresistible implication is that he is an apparently willing and competent person per se. To support this position we need look no further than the record in Guarro, supra, and the record in the case at bar. The victimized policeman in both instances was the same person.

The distinction drawn by Judge Washington in Guarro as between a drug peddler and this type of case permits no conclusion other than that a decoy cannot be assaulted within the meaning of the statute. As was stated in Childs v. U. S., ___ U. S. App. D.C. ___, decided December 18, 1958, "reasonable suspicion [by a police decoy] is enough" to escape the charge of entrapment in a narcotics sale. The admission of the officer in this case that he was suspicious of the defendant in the "sexual sphere" (Appellant's Br. P. 6, JA 9) foreclosed further activity as a police decoy leading to an arrest under the assault statute. Put another way, did the policeman "do no more than permit the alleged touching" when, following his suspicion concerning defendant, the arresting officer by a series of acts made himself available to the defendant. The short answer is that once the policeman is aware of the likelihood of an approach by the defendant, he does more than

permit the alleged touching when he indicates availability, tacitly or otherwise. This is especially true when we are dealing with a known facility on the part of the policeman for lending himself to homosexual advances. This talent on the part of the arresting officer was also known to the trial judge below who also presided at the trial of Guarro.

While it may be true that a degree of subterfuge is permissible on the part of arresting officers in other sexual offenses, Guarro clearly decides that any conduct intimating apparent consent forecloses prosecution for assault. In describing the police officer's behavior, the phrase "totality of the policeman's conduct"² was employed solely because a flirtation between males has the same quality as a flirtation of the acceptable heterosexual variety. Words need not be spoken -- movements are subtle and defy description. Appraisal as flirtation can only be done in terms of "totality of conduct". The police decoy by definition is there "to lure into danger by artifice".³ And when the evidence is clear that the policeman was in the role of decoy, then his actions cannot be appraised and assessed as if he were a private

² Guarro, supra, 99 U.S. App. D.C. 97, 101, 237 F.2d 578, 582

³ "Decoy" as defined in Webster's New International Dictionary - Second Edition.

citizen or an ordinary policeman not assigned to this type of duty.⁴ Guarro unmistakably says as much. The Court, in this case, is seemingly in conflict with Guarro. Moreover, the net effect of this apparent conflict within the Court is to exonerate Guarro and condemn Seitner notwithstanding the facts in both cases defy distinction in any material manner.

⁴ Chapter 121 of the British Wolfenden Report (Report of the Committee on Homosexual Offenses and Prostitution) is quoted in full. The chapter quoted appears under the heading of "Persistent Soliciting or Importuning".

"121. This particular offence necessarily calls for the employment of plain-clothes police if it is to be successfully detected and prevented from becoming a public nuisance; and it is evident that the figures of convictions, both for importuning and for indecencies committed in such places as public lavatories, must to some extent reflect police activity. It has been suggested by more than one of our witnesses that in carrying out their duty in connection with offences of this nature police officers act as agents provocateurs. We have paid special attention to this matter in our examination of the Commissioner of Police and other senior police officers, and we are satisfied that they do everything they can to ensure that their officers do not act in a deliberately provocative manner. We also made a special point of examining some of the constables engaged in this work. Those whom we saw were ordinary police constables, normally employed on uniformed duty but occasionally employed in pairs, for a four weeks' spell of duty on this work, between substantial periods of other duties. We feel bound to record that we were on the whole favourably impressed by the account they gave us of the way in which they carried out their unpleasant task. It must, in our view, be accepted that in the detection of some offences -- and this is one of them -- a police officer legitimately resorts to a degree of subterfuge in the course of his duty. But it would be open to the gravest objection if this were allowed to reach a point at which a police officer deliberately provoked an act; for it is essential that the police should be above suspicion, and we believe that if there is to be an error in the one direction or the other it would be better that a case of this comparatively trivial crime should occasionally escape the courts than that the police as a whole should come under suspicion."

CONCLUSION

For the foregoing reasons, appellant respectfully urges that this petition for rehearing be granted and that upon rehearing this Court must vacate its judgment, reverse the judgment of conviction and remand this case to the Municipal Court for the dismissal of the information.

Respectfully submitted,

Hyman Smollar
Attorney for Appellant
517 Wyatt Building
Washington 5, D. C.

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and is not for the purposes of delay.

Hyman Smollar

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing was served on Oliver Gasch, Esq., United States Attorney, United States Court House, Washington 25, D. C., Attorney for Appellee, this 24th day of December, 1958.

Hyman Smollar

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,547

143

PHILIP G. SMITNER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

**Appeal from the Municipal Court of Appeals
for the District of Columbia**

OLIVER GASCH,

United States Attorney.

CARL W. BELCHER,

LOUIS M. KAPLAN,

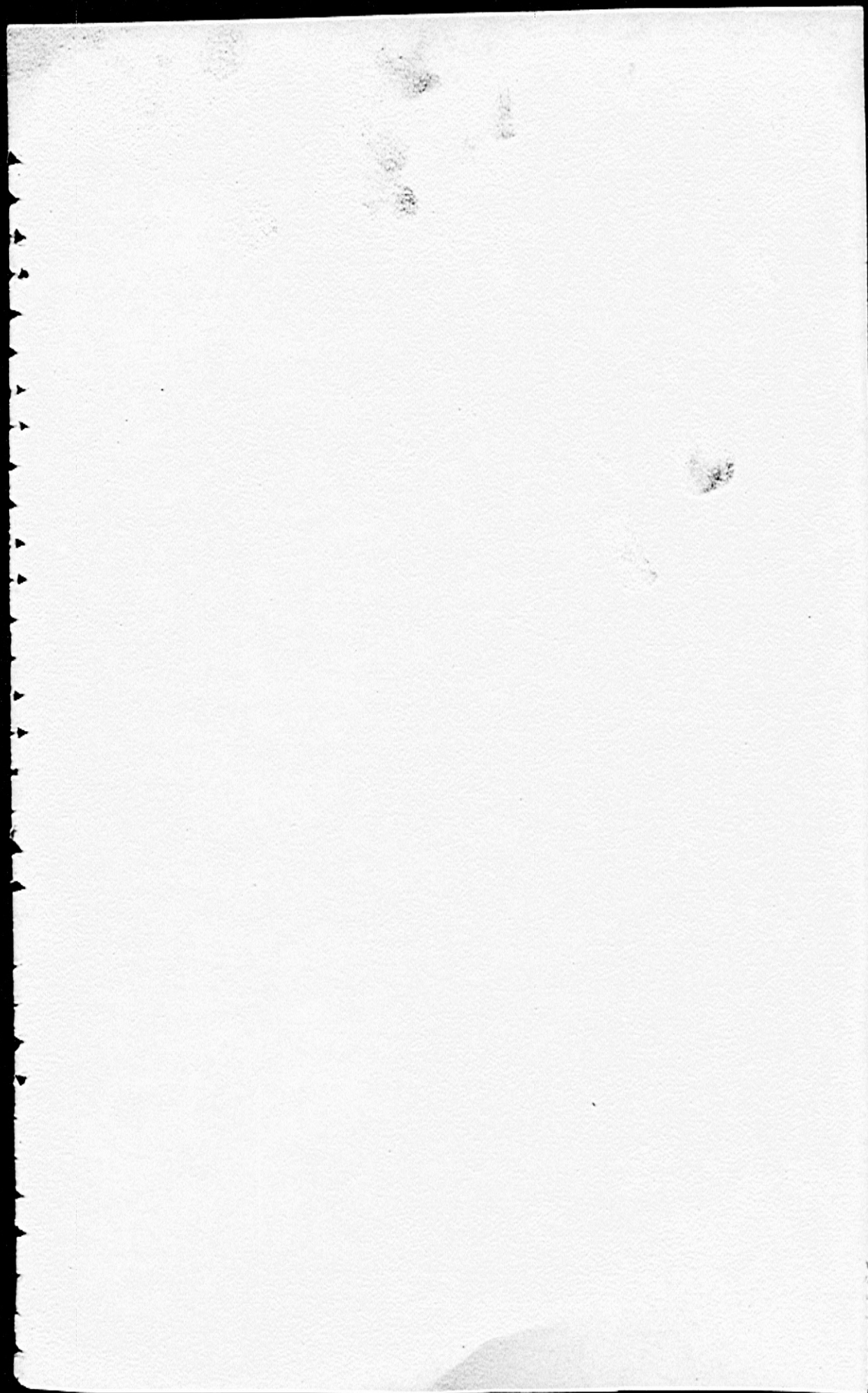
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

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Joseph W. Stewart
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No. 14,547

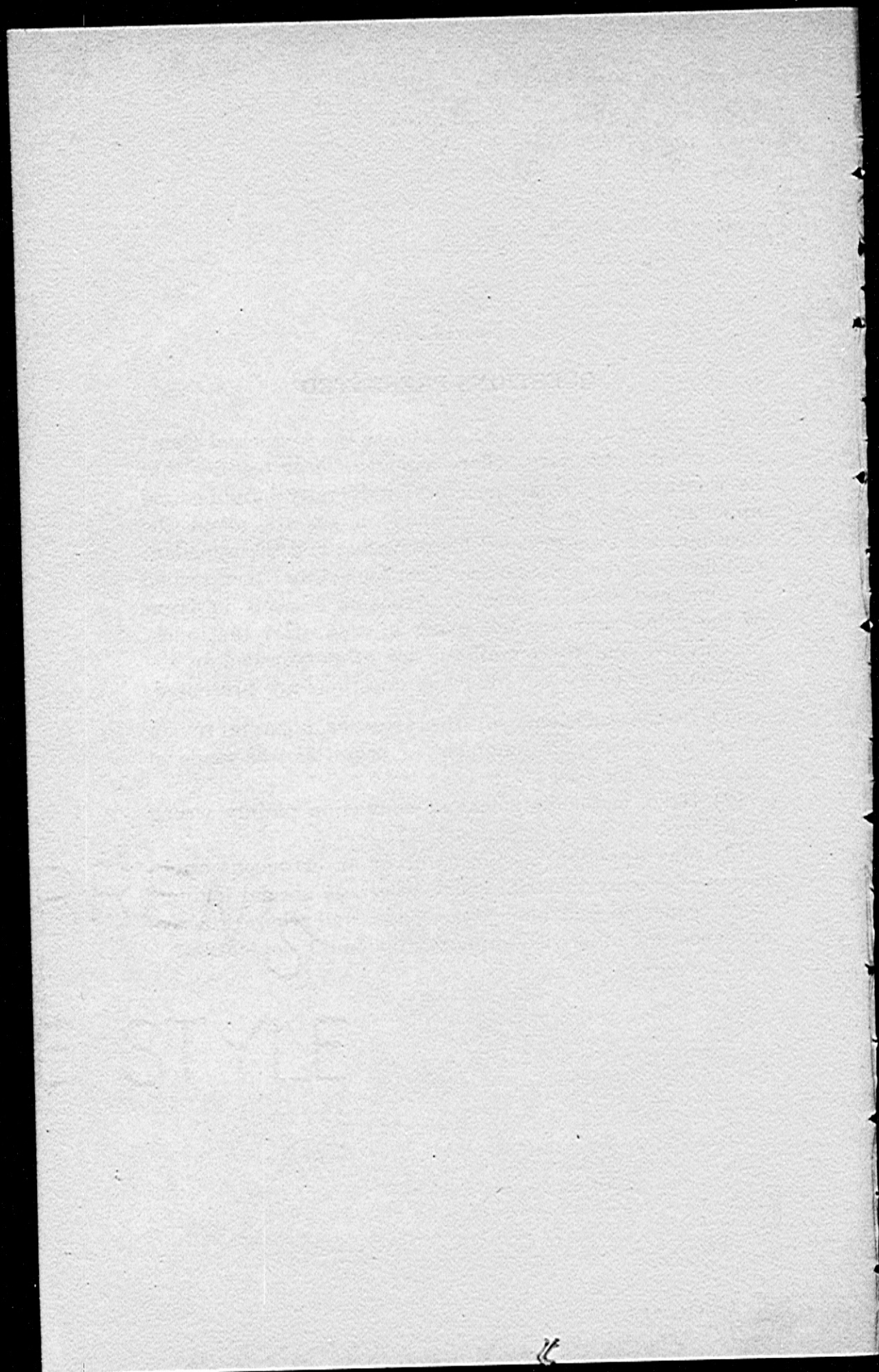
QUESTIONS PRESENTED

In a prosecution for assault before the Municipal Court sitting without a jury, where a police officer testifies that he was using a urinal in a local university building and appellant came to his side, made a remark about the weather, and then grasped his privates; and the appellant testifies that the police officer first looked and then smiled at him, and was deliberately exposing himself in front of the urinal and was not using it, and, after the touching invited him to commit an act of perversion, in the opinion of appellee the following questions are presented:

(1) Is the sufficiency of the evidence open to review where no motion for judgment of acquittal was made at the close of the case?

(2) If so, is the judgment of conviction plainly wrong or without evidence to support it?

(3) May appellant assign as error an erroneous application of law by the trial court, where no special findings were requested and none were made, and where the record does not otherwise support appellant's contention?



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,547

PHILIP G. SEITNER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Municipal Court of Appeals
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By information filed in the Municipal Court, Criminal Division, appellant was charged with assault (D.C. Code 1951, 22-504) (J.A. 1). A plea of not guilty was entered, and trial was before the court without a jury. Appellant was found guilty and sentenced to pay a fine of \$150 or serve 90 days in jail (J.A. 26). The Municipal Court of Appeals affirmed the conviction without dissent. This appeal followed.

(1) The Assault

Although the actual touching was not disputed by appellant at trial, there was conflict in the crucial testimony bearing on the question of consent. The following evidence stands uncontradicted. In response to a number of complaints, Officer Fochett, of the Metropolitan

Police Department, went to the men's room of a George Washington University building (J.A. 6, 15). Appellant was not in the men's room when Fochett arrived. He came there some four or five minutes later (J.A. 6). During that four or five minute period Fochett had under surveillance someone, not identified at trial, who was inside a closed booth (J.A. 5-6). The critical events then occurred. Officer Fochett and appellant were the sole eye witnesses. Their versions of these events are set forth separately.

(a) Officer Fochett's testimony

Officer Fochett remained standing directly across from the doorway to the first stall when appellant entered the men's room (J.A. 6-7).¹ Although he did not directly observe him, Officer Fochett was aware of appellant's presence and of his moving about. He noticed appellant go to the urinal and to the mirror, but could not recall whether he went to the washbowl, since he was not constantly watching appellant during this two to three minute period (J.A. 7). Fochett did look in appellant's direction but could not recall whether appellant, who was moving about, had looked back (J.A. 8).

Two or three minutes passed from the time of appellant's entry into the men's room when Officer Fochett moved from his original standing position and walked to a center urinal. At this time appellant was standing close to the washbasin. (J.A. 8.) While standing a distance of about five to six inches from the outer edge of the urinal, Fochett urinated (J.A. 9, 11). At this point appellant walked over to the windows, which were at a ninety-degree angle to the urinals, and peered out for a moment (J.A. 4). He then walked toward and stood directly to the left of Fochett, and commented to him that it was still raining (J.A. 3). Fochett replied: "Yes. That's Washington weather for you". (Id.). Appellant then reached over and placed his hand on Fochett's pri-

¹ Fochett testified that to the best of his recollection he was standing up straight, and not leaning against the wall (J.A. 7).

vates (Id.). About thirty seconds elapsed from the time Fochett had gone to the urinal to the time of the touching (J.A. 11-12).

(b) Appellant's Testimony

While in a George Washington University building appellant decided to use the men's room (J.A. 15). Upon entering he noticed Officer Fochett standing inside (J.A. 16). He hung up his coat and umbrella, went to a urinal, and relieved himself (Id.). He turned to use the wash basin, and again noticed Fochett standing in front of the booths about three or four feet away from the mirror (Id.). Fochett watched appellant as he washed and dried his hands and combed his hair (J.A. 17). As he took his coat to leave, he looked at Fochett for the first time. Fochett smiled at him (J.A. 19.) Fochett then moved past the right side of appellant and stood in front of the wash basin (J.A. 16). Appellant took down his coat and unumberla, put his coat on, and for the first time looked at Fochett (Id.). Fochett looked at appellant, turned and went to the urinal (Id.). Appellant walked to an open window which was directly in line with the urinal, glanced out, and turned as if to leave (Id.). He thereupon noticed that Officer Fochett, who was wearing a coat, was standing and exposing himself, and was not urinating (J.A. 17, 19, 21). Appellant did not see Officer Fochett's privates exposed until he walked over to the window and turned around to look at him (J.A. 22, 24). He then walked over to where Officer Fochett was standing, and remarked to him that it was still pouring (J.A. 22-23). Officer Fochett replied, in substance, that the weather was typical for Washington (J.A. 23). Although no further conversation ensued, a short time interval passed before the touching took place (J.A. 23-24).²

² Not referred to in appellant's brief is the testimony of Dr. Caprio, a defense witness. In response to a hypothetical question he testified that appellant was "not capable of making a homosexual assault * * * without a given situation or set of circumstances, because of his passivity." (J.A. 25).

(2) Events Subsequent to the Assault

Appellant testified that immediately after the touching, but just prior to his arrest, Officer Fochett invited appellant to commit an act of perversion (J.A. 18). Appellant, according to his testimony, turned as if to leave, and then was arrested. Officer Fochett did not specifically deny making this invitation. He did, however, give detailed testimony regarding the events that transpired before, during, and after the touching, and made no mention at all of the alleged solicitation. On cross-examination defense counsel elicited the following answers:

MR. SMOLLAR: After he touched your privates, what did you do?

OFFICER: I showed him my badge and told him he was under arrest.

MR. SMOLLAR: Now, that was immediately after the touching; is that correct?

OFFICER: That's right. (J.A. 11.)

Defense counsel did not ask Officer Fochett whether he admitted or denied making the oral invitation. On direct examination Officer Fochett had testified as follows:

And at that time he reached over and placed his hands on my privates and I placed him under arrest. And I walked him out of the room and Officer Arscott and Officer Rinaldi were standing just outside the door, and I turned Mr. Seitner over to Officer Arscott and asked Arscott to hold him for me (J.A. 3).

Later on the same day Officer Fochett talked to appellant at police headquarters. Appellant told Fochett that he went to the men's room to comb his hair. He admitted the touching to Officer Fochett, and gave as his reasons his loss of control over himself, and his belief that Fochett was exhibiting. He acknowledge a prior touching of this nature while at college. (J.A. 3.) Officer Rinaldi testified that he overheard appellant make these same statements to Fochett. (J.A. 13.)

STATUTES INVOLVED

District of Columbia Code, § 11-772(c), provides in pertinent part:

"... If the issues of fact shall have been tried by jury, The Municipal Court of Appeals for the District of Columbia shall review the case only as to matters of law. If the case shall have been tried without a jury, the Municipal Court of Appeals for the District of Columbia shall have the power to review both as to the facts and the law, but in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it."

District of Columbia Code, § 22-504, provides:

"Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both."

Rule 14, II(b), Municipal Court Criminal Rules provides:

Trial Without A Jury.—In a case tried without a jury the Court shall make a general finding and shall in addition on request find the facts specially.

SUMMARY OF ARGUMENT

1. Attack upon the sufficiency of the evidence must be in terms of manifest error or serious injustice since appellant failed to move for judgment of acquittal at the close of all the evidence.

2. Even if the motion for acquittal had been made, the judgment below should be affirmed since it is not "plainly wrong or without evidence to support it." D.C. Code, § 11-772. The testimony adduced at trial was in conflict and plainly presented an issue of fact. The complaining witness, a police officer, testified that while he was using a urinal appellant came to his side, made a remark about the weather, and then grasped his privates. Appellant denied that the officer was using the

urinal, and testified that he was deliberately exposing himself in front of it.

3. During the course of trial the court commented that the officer had a right to be in the men's room, since he had gone there in response to a complaint. Such comment does not disclose an erroneous application of this Court's *Guarro* decision. In any event, the question is not properly preserved, appellant having failed to request special findings. Rule 14, II(b), Criminal Rules of the Municipal Court.

ARGUMENT

I

Appellant Is Foreclosed From Attacking The Sufficiency Of The Evidence Because He Failed To Move For Judgment Of Acquittal At The Close Of Trial

It is fundamental that verdicts, whether of a jury or of a judge sitting as trier of the facts, are not reviewable. This is not to suggest, however, that the sufficiency of the evidence is never considered on appeal. The evidence must be considered in reviewing the denial of a motion for judgment of acquittal. In so doing, it is not the verdict of the finders of fact which is subjected to appellate scrutiny, but the judge's refusal to take the case from the trier of fact.

This is but one application of the general rule that courts of appeals review rulings of the lower court made in the course of a trial, and, where an incorrect and prejudicial ruling is made, the judgment of the court below is reversed. Application of this broad principle makes it necessary, in most cases, for a party to make his objection in the lower court in order to preserve a question on appeal. By giving the lower court an opportunity to rule, a record is made on the issue which may serve as a basis for appellate review. If no such record is made, appellate relief may be granted only where manifest error is disclosed in the record.

In the case at bar, appellant did not move for judgment of acquittal at the close of all the evidence. Having failed to make such a motion, he cannot now contend that the trial judge erred in failing to grant it. But he makes that very contention. His principal argument is that the evidence is as consistent with innocence as with guilt (Br. 5-8). His real complaint, therefore, is that the trial judge, who sat without a jury, never should have reached the question of appellant's guilt or innocence, but should have held, as a matter of law, that the evidence was insufficient to convict. It becomes clear, then, that appellant is contending that judgment of acquittal should have been entered, even though no such request was made at trial.

Appellant did move for a judgment of acquittal at the close of the Government's case. However, by thereafter putting on his own evidence, he waived his motion, and foreclosed appellate review of its denial. *Hall v. United States*, 83 U.S.App.D.C. 166, 168 F.2d 161, cert. denied, 344 U.S. 853 (1948); *Maulding v. United States*, 257 F.2d 56 (9th Cir. 1958); *Piccuirro v. United States*, 250 F.2d 585 (8th Cir. 1958); *Benham v. United States*, 215 F.2d 472 (5th Cir. 1954); *Ansley v. United States*, 135 F.2d 207 (5th Cir. 1943); *United States v. Maryland & Virginia Mild Producers Association*, 90 F.Supp. 681, 684 (D.C.D.C. 1950), reversed on other grounds, 90 U.S.App. D.C. 14, 193 F.2d 907 (1951).

The motion for judgment of acquittal was never renewed. The record, therefore, contains no ruling by the trial court which brings into issue the sufficiency of the evidence. In *Battle v. United States*, 92 U.S.App. D.C. 220, 221, 206 F.2d 440, 441 (1953), the Court noted that "manifest error or serious injustice" could nonetheless be rectified. *Benham v. United States*, 215 F.2d 472 (5th Cir. 1954) sets forth a similar rule, holding that the sufficiency of the evidence will not be considered "except to prevent a miscarriage of justice". See also *Ansley v. United States*, *supra*.

It is anticipated that appellant will take the position that where trial is without a jury, it is unnecessary to renew a motion for judgment of acquittal. Our research indicated that *DeLuna v. United States*, 228 F.2d 114 (5th Cir. 1955) and *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956) stand alone in support of this position. We urge, however, that these cases were wrongly decided, and that no such distinction should be drawn in cases tried without a jury. If a motion is made at the close of all the evidence for a judgment of acquittal in a non-jury trial, the trial judge must consider whether sufficient evidence has been presented to support a conviction. If the motion is denied, the trial judge must then determine whether the government has proved to his satisfaction that the defendant is guilty beyond a reasonable doubt. Completely different standards are applicable to the performance of these functions. In the former situation the judge determines the sufficiency of the evidence as a matter of law; in the latter, he weighs the evidence, determines credibility, and ultimately decides whether the defendant is guilty or not guilty.

The case of *United States v. Jones*, 174 F.2d 746 (7th Cir. 1949), by plain implication, supports the Government's position. In that case trial was without a jury. The defendant moved "for discharge" at the close of the Government's case, then introduced some evidence, and at the conclusion of all the evidence renewed his motion "for discharge". The Court of Appeals held that the sufficiency of the evidence could be raised on appeal because the motion "for discharge" would be treated as a motion for acquittal. This question would not have been reached had the court been of the view that no motion for acquittal need be made at the close of all the evidence in a non-jury trial in order to question the sufficiency of the evidence on appeal. And in *Harper v. United States*, 143 F.2d 795, 807 (8th Cir. 1944), the court held, in a non-jury case, that the defendant was not entitled to a review of the sufficiency of the evidence even though a motion was made at the close of all the evidence to dismiss the indictment.

To recapitulate: Appellant's burden on appeal is unusually heavy; he must demonstrate that "manifest error or serious injustice" is disclosed in the record. Such a showing cannot be made where, as here, there is substantial evidence in support of the verdict.

II

There Is Substantial Evidence To Support The Verdict

A. *Scope of Review: Appellant Has Not Shown the Judgment is Wrong or Without Evidence to Support It.*

D.C. Code, § 11-772(c), sets forth the applicable standards that the Municipal Court of Appeals must follow in reviewing decisions of the Municipal Court. It is there provided, in pertinent part:

If the issues of fact shall have been tried by jury, the Municipal Court of Appeals for the District of Columbia shall review the case only as to matters of law. If the case shall have been tried without a jury, The Municipal Court of Appeals for the District of Columbia shall have the power to review both as to the facts and the law, but *in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it.* [Emphasis added.]

Hence, even if it be assumed that appellant has preserved the question of the sufficiency of the evidence for appellate review, the judgment of the trial court must be affirmed "unless it appears that the judgment is plainly wrong or without evidence to support it". It thus appears that review of the evidence may be more limited in District of Columbia cases than in those governed by the Federal Rules of Criminal Procedure. A complete analysis of the principles governing the latter group is contained in *Curley v. United States*, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232, cert. denied, 331 U.S. 837 (1947):

"... If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal,⁶ must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. . . ."

See also *Cooper v. United States*, 94 U.S.App.D.C. 343, 218 F.2d 39 (1954); *Thomas v. United States*, 93 U.S.App.D.C. 392, 211 F.2d 45, cert. denied, 347 U.S. 969 (1954); *May v. United States*, 84 U.S.App.D.C. 233, 175 F.2d 994 (1949).

It is axiomatic that issues of credibility, the weight to be accorded the evidence, and the reasonable inferences that may be drawn therefrom are matters left solely to the trier of the facts. *Curley v. United States*, *supra*,

⁶ Footnote omitted.

81 U.S.App.D.C. at 392, 160 F.2d at 232; *Thomas v. United States, supra*, 93 U.S.App.D.C. at 393, 211 F.2d at 46; *May v. United States, supra*, 84 U.S.App.D.C. at 246, 175 F.2d at 1007.

It is equally clear that "Upon a motion for judgment of acquittal, the trial judge must assume the truth of the Government's evidence and give to the Government the benefit of all legitimate inferences to be drawn therefrom". *Thomas v. United States, supra*. No quantity of contrary evidence will authorize a trial court to direct a verdict if there is sufficient evidence to take the case to the jury. *Ross v. United States*, 197 F.2d 660, (6th Cir.), *cert. denied*, 344 U.S. 832 (1952).

The Courts of Appeals appear to be unanimous in the view that in passing on a motion for directed verdict the evidence must be considered in the light most favorable to the prosecution. *Kowalchuk v. United States*, 176 F.2d 873 (6th Cir. 1949); *Coopersmith v. United States*, 176 F.2d 353 (4th Cir. 1949); *Richardson v. United States*, 150 F.2d 58, 62 (6th Cir. 1945); *United States v. Horton*, 180 F.2d 427 (7th Cir. 1950); *Alexander v. United States*, 241 F.2d 351, 355 (8th Cir. 1957). And, in determining whether to take the case from the jury the trial judge may discount the defendant's testimony. *Wilson v. United States*, 250 F.2d 312, 318 (9th Cir. 1957).

B. The Evidence

The testimony of Officer Fochett plainly supports a finding of guilt. See Counterstatement, *supra*, p. 2. Fochett testified that he was assaulted while using a urinal. He was rigorously cross-examined in great detail by defense counsel as to exactly what happened during the short time interval before, during and after the assault. There is nothing in Fochett's testimony that in any way suggests that he invited appellant to grasp his privates. Officer Fochett, according to his testimony, did nothing more than is done thousands of times a day in the numerous public rest rooms in Washington. If such conduct constitutes an invitation to an indecent

assault, then such solicitations are the rule rather than the exception.

Two or three minutes after appellant entered the men's room, Fochett walked over to a center urinal and proceeded to relieve himself. Prior to his walking to the urinal Fochett had been standing in the men's room.³ He had not been watching appellant and had not spoken to him. Within thirty seconds after he got to the urinal he was assaulted. Immediately prior to the assault appellant, who was the first to speak, made a nondescript comment about the weather, to which Fochett gave a nondescript reply.

Appellant's contention that consent is established as a matter of law rests on his own testimony that Fochett was exhibiting himself at the urinal. He testified that had Fochett been urinating when he (appellant) turned to look at Fochett, he would not have committed the assault (J.A. 24). Appellant did not testify that Fochett orally solicited him prior to the touching, or even that Fochett spoke to him first. Nor did appellant testify that Fochett made any gestures that could be construed as an invitation to an indecent assault. According to appellant's own testimony, he was prepared to leave the men's room when Fochett walked over to the urinal. He admitted that he was the first to speak and that he could not see Fochett exhibiting himself until he walked across the men's room to a window and turned around.

Appellant's own testimony, developed on cross-examination, stamps him as the uninvited aggressor:

BY MR. O'CONNELL AND APPELLANT

Q. I see, sir. And after did you at that time comb your hair?

³ Appellant states (Br., p. 6) that Fochett was "wandering about the men's room for 2 or 3 minutes for no apparent reason while the defendant was present." The record, however, indicates that Fochett remained standing where he was during the period referred to (J.A. 7-8). In fact, appellant himself testified that Fochett "was doing nothing but standing there." (J.A. 16). Nothing in the record suggests that appellant was "wandering about".

A. Yes. As a matter of fact, I put some water on it and combed it.

Q. And at this point you had had no conversation with the officer; is that correct?

A. Indeed not.

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Q. And at that time you had already visited the urinal; you had combed your hair, and you had washed your hands; is that correct?

A. That's right.

Q. At that time did you leave?

A. No; I did not leave.

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Q. Let me ask you this: From the time you progressed from the front of the booth to the time you went to the window, Officer Fochett was in fact in front of the urinal.

A. Yes; he was.

Q. And at that time his back was to you; wasn't it, sir?

A. Yes.

Q. He had a coat on; didn't he, sir?

A. Yes.

Q. Were you able at that time to see his privates exposed?

A. I wouldn't know what you mean by "that time."

Q. At that time—from the time you progressed from in front of that booth until you reached the window, were you able to see his privates exposed?

A. I couldn't because I didn't even look at that time.

Q. And yet, you were ready to leave, were you not, when you got down your coat?

A. I could have left; yes.

Q. You could have left; but you didn't. A. (Pause)

Q. Is that correct, sir?

A. I did not.

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Q. You state that you walked back to that window. Did you look out that window?

A. I just glanced out to see if it was still pouring down rain.

Q. Is there an areaway or what fronts on that window, sir?

A. Apparently, just an areaway because all I saw was a concrete wall.

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Q. Up to that time, at no time had you seen Private Fochett's privates exposed, is that correct?

A. Up to that time; no.

Q. I see, sir. But if this were the window facing in this direction Officer Fochett would have been to your right rear; is that correct?

A. When I glanced out the window, he would have been to my rear.

Q. To your right rear. Did Officer Fochett say anything to you at that time, sir? Did he call you?

A. At that moment?

Q. Yes.

A. I was at the window scarcely a second and turned around—

Q. And you turned towards the urinals; is that correct?

A. That's right.

Q. And at that time did you look at the officer?

A. I did.

Q. I see, sir. Now, you heard the testimony that Officer Fochett was approximately at the middle urinal, and you, by your own testimony, put yourself over here by the window; is that correct?

A. That's the way it was.

Q. At that time, after you looked and saw Officer Fochett, you went over to where Officer Fochett was standing; is that correct?

A. That's right.

Q. This alleged touching took place in front of the urinal where he had been standing; is that correct?

A. Yes. [JA. 21-22.]

The principal conflict in the testimony of appellant and Officer Fochett is found in appellant's testimony that Fochett was standing in front of the urinal, was not urinating, and was exhibiting himself. Fochett testified that he was urinating. Appellant himself stated that he would have left the washroom had Fochett been urinating. If Fochett's testimony is believed, and for purposes of this appeal it must be, it is apparent that there was no basis for appellant's belief that he was dealing with a consenting person. Thus, the trier of fact could have concluded not only that there was no basis for ap-

pellant's alleged belief, but that appellant in fact did not believe he was dealing with a consenting person. Conviction can properly rest on either basis.

Appellant relies on *Guarro v. United States*, 99 U.S. App.D.C. 97, 237 F.2d 578 (1956). But in that case this Court held that "If the policeman did no more than permit the alleged touching there would be no real or apparent consent". (At p. 101 and p. 582).⁴

Officer Fochett's testimony can support but one conclusion, i.e. that consent was not given. As noted by the Municipal Court of Appeals, this Court, in reversing *Guarro*, stated that the policeman's conduct was for the most part not disputed. And, as stated by the Municipal Court of Appeals, "That is not true in this case". The principle conflict in the evidence, as stated above, is whether Fochett was using the urinal or exhibiting in front of it. There are other points of distinction. In *Guarro*, the police officer testified that after the touching he invited the defendant to commit an act of perversion. Appellant did testify that such an inquiry was made, but no such admission was made by Officer Fochett in this case. Although Fochett was not asked by either counsel whether he made the inquiry, his testimony, by plain implication, indicates that he in fact did not. See Counter-statement, *supra*, p. 4.⁵

Additional variances are to be found. Appellant testified that Fochett was watching him as he was combing his hair (J.A. 17), and that when he took his coat to leave, he, appellant, looked at Fochett, and Fochett smiled at him (J.A. 19). Although Fochett testified that he looked in appellant's direction a few times (J.A. 8), there is nothing in his testimony to indicate that he smiled at appellant.

⁴ This quotation negates appellant's suggestion (Br., p. 7) that the failure of Fochett to interfere with the grasping of his privates is indicative of consent.

⁵ In any event, it is not clear how conduct of the policeman occurring after the touching can support a finding of consent to the touching.

III

**The Record Does Not Support Appellant's Contention
That The Guarro Decision Was Misapplied By The
Trial Court**

Appellant contends that the trial court did not follow the rule set forth in *Guarro* respecting consent (Br., p. 4-5). However, the colloquy relied upon in support of this contention does not reflect a disregard or misapplication of *Guarro*. In stating that it made no difference whether Fochett had the urge to urinate or not, the trial court was merely pointing out that Fochett had a right to be where he was. In other words, a policeman can go into a men's room for reasons other than to relieve himself, at least when he goes in response to complaints. In any event, *Guarro* condemns a course of conduct, i.e. outward manifestations of consent by a police officer. It does not condemn his mental processes, or his motive, unless such thoughts in some way affect his conduct.⁶

Moreover, appellant has failed to properly present this point for appellate consideration. If, during trial, appellant suspected that the trial judge misapplied the law in rendering his verdict, it was incumbent upon him to request special findings of fact.⁷ Unless special findings are requested, it is impossible to determine whether the trial court, acting in its fact finding capacity, properly applied the law. Where there is a jury, the court's instructions enable an appellate court to review the lower court's understanding of the law. The rule applicable to trial without a jury is that where no special findings are sought, and the evidence supports the verdict, the judgment will be affirmed. See, e.g., *United States v. Owens*, 231 F.2d 831, 833 (7th Cir.), cert. denied, 352 U.S. 843 (1956); *Cesario v. United States*, 200 F.2d 232 (1st Cir. 1952); *Blunden v. United States*, 169 F.2d 991 (6th Cir. 1948).

⁶ For this reason it is irrelevant that Fochett suspected appellant in the "sexual sphere", and hence appellant's reliance on such testimony (Br., p. 6) is misplaced.

⁷ Provision for special findings of fact is made in Rule 14, II(b), Criminal Rules of the Municipal Court. Cf. Rule 23(c), F.R. Crim. P.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the lower court be affirmed.

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